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ULTA and USLTA in Coursebooks and Classrooms

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I. INTRODUCTION

Although neither the Uniform Land Transaction Act ("ULTA")¹ nor the Uniform Simplification of Land Transfers Act ("USLTA")² has been adopted by any state, both may have had an impact on the way we think about modernizing state real property law. The Acts have been cited as

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The author expresses thanks to her research assistant Jennifer Gomberg.

1. U.L.T.A. (1975).

2. U.S.L.T.A. (1976).

secondary authority in judicial opinions,³ studied and analyzed in law review articles,⁴ and referenced in reporter's notes in various Restate-

3. Gerald Korngold, *Seller's Damages from a Defaulting Buyer of Realty: The Influence of the Uniform Land Transactions Act on the Courts*, 20 NOVA L. REV. 1069 (1996).

4. See, e.g., Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293 (1993); Roger W. Andersen, *Conveyancing Reform: A Great Place to Start*, 25 REAL PROP. PROB. & TR. J. 333 (1990); Marion W. Benfield, Jr., *The Future Advances Lender: Status Under Present Illinois Law and Under ULTA and USOLTA*, 1981 S. ILL. U. L.J. 451; Curtis J. Berger, *ULSIA and the Protected Party: Evolution or Revolution?*, 24 CONN. L. REV. 971 (1992); Roger Bernhardt, *ULSIA's Remedies on Default—Worth the Effort?*, 24 CONN. L. REV. 1001 (1992); Alan J. Blocher, *Due-on-Sale in the Secondary Mortgage Market*, 31 CATH. U. L. REV. 49 (1981); Barbara J. Britzke, *Residential Real Estate Transactions: A Comparison of the Uniform Land Transactions Act and Maryland Law*, 13 U. BALT. L. REV. 43 (1983); Ronald B. Brown, *Article 1 of the Uniform Land Transactions Act: Is Inconsistency with the UCC an Unnecessary Obstacle?*, 1981 S. ILL. U. L.J. 585; Jon W. Bruce, *An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act*, 10 STETSON L. REV. 1 (1980); Jon W. Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 GEO. L.J. 1245 (1976); Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331 (1992); Robert D. Brussack, *Reform of American Conveyancing Formality*, 32 HASTINGS L.J. 561 (1981); K. Tate Chambers, Comment, *A Comparison Between Article 5 of the Uniform Simplification of Land Transfers Act and Present Illinois Mechanics' Lien Law*, 1981 S. ILL. U. L.J. 563; Caryn M. Chittenden, Comment, *From Caveat Emptor to Consumer Equity—The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 571 (1992); Michael Cox & Michael McCue, Comment, *The Nebraska Construction Lien Act: Which Way to Lien?*, 62 NEB. L. REV. 86 (1983); Meredith Craig, Symposium, *The Uniform Land Transactions Act and The Uniform Simplification of Land Transfers Act: Potential Impact on Florida Law*, 10 STETSON L. REV. 21 (1980); Allison Dunham, *Reflections of a Drafter: Allison Dunham*, 43 OHIO ST. L.J. 569 (1982); Allison Dunham, *Reflections of a Statutory Draftsman: The Land Transaction Acts*, 1981 S. ILL. U. L.J. 549; Allison Dunham, *Statutory Reformation of Land Obligations*, 55 S. CAL. L. REV. 1345 (1982); Sara E. Dysart, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 ST. MARY'S L.J. 113 (1980); William J. Fields, *Housing Defects: Homeowners' Remedies—A Time for Legislative Action*, 21 WASHBURN L.J. 72 (1981); Edwin M. Ginsburg, *The Doctrine of Merger with Respect to Real Estate Transactions: Taking the Bull by the Horns*, 16 NOVA L. REV. 1171 (1992); Alan S. Gover & Glenn D. West, *The Texas Nonjudicial Foreclosure Process—A Proposal to Reconcile the Procedures Mandated by State Law with the Fraudulent Conveyance Principles of the Bankruptcy Code*, 43 SW. L.J. 1061 (1990); William H. Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C. L. REV. 257 (1985); James B. Hughes, Jr., *Future Advance Mortgages: Preserving the Benefits and Burdens of the Bargain*, 29 WAKE FOREST L. REV. 1101 (1994); Gerald Korngold, *Construction Loan Advances and the Subordinated Purchase Money Mortgagee: An Appraisal, a Suggested Approach, and the ULTA Perspective*, 50 FORDHAM L. REV. 313 (1981); Robert Kratovil, *Mortgage Law Today*,

ments.⁵ This article focuses on the use of these proposed Acts in law school classes and coursebooks.

Over a decade ago it was noted:

13 J. MARSHALL L. REV. 251 (1980); Andrew Lance, *Balancing Private and Public Initiatives in the Mortgage-Backed Security Market*, 18 REAL PROP. PROB. & TR. J. 426 (1983); Linda M. Libertucci, Comment, *Builder's Liability to New and Subsequent Purchasers*, 20 SW. U. L. REV. 219 (1991); Peter B. Maggs, *Land Records of the Uniform Simplification of Land Transfers Act*, 1981 S. ILL. U. L.J. 491; B. Taylor Mattis, *The Uniform Simplification of Land Transfers Act: Article 2—Conveyancing and Recording*, 1981 S. ILL. U. L.J. 511; John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61 (1992); John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(B)*, 27 WAKE FOREST L. REV. 455 (1992); Sue Ortman, *USLTA: Marketable Record Title Act—A New Title Theory and Its Effect on Texas Law*, 12 ST. MARY'S L.J. 462 (1980); James W. Pedowitz, *Uniform Simplification of Land Transfers Act—A Commentary*, 13 REAL PROP. PROB. & TR. J. 696 (1978); James M. Pedowitz, *USLTA—ULTA Perspective*, 57 TITLE NEWS 23 (1978); Patricia E. Rant, *ULTA and Non-Judicial Mortgage Foreclosure in Texas*, 12 ST. MARY'S L.J. 1104 (1981); Maureen M. Rayborn, Comment, *Uniform Land Transactions Act: Pennsylvania Property Law and Sellers' Remedies for Breach of Contract for Sale of Real Estate*, 55 TEMPLE L.Q. 577 (1982); Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261 (1991); David P. Schwartz, Note, *BFP v. Resolution Trust Corporation: Critiquing the Supreme Court's Method of Determining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures*, 31 CAL. W. L. REV. 345 (1995); Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists under One Roof*, 1993 WIS. L. REV. 13 (1993); Paul Teich, *A Second Call for Abolition of the Rule of Merger by Deed*, 71 U. DET. MERCY L. REV. 543 (1994); Craig D. Tindall, *The Obligatory Advance Rule in the Construction Lending Context*, 12-JAN CONSTRUCTION LAW 13 (1992); Comment, *The Uniform Simplification of Land Transfers Act: Areas of Departure from State Law*, 73 NW. U. L. REV. 359 (1978); Note, *Real Property—Warranties in the Uniform Land Transactions Act of 1975—Progression or Retrogression for Pennsylvania?*, 49 TEMPLE L.Q. 162 (1975).

An interesting spin-off from an idea presented in one of these law review articles illustrates the value of comparison of a uniform act and present state law. An article dealing with the formalities of conveyances under USLTA made the point that under the Act, a writing is required for an effective transfer of an interest in real estate. No such requirement was found in the Illinois statutes. Mattis, *supra*, at 514-16. A 45 page law review article thoroughly analyzed the rather startling situation that no Illinois law prohibits the oral transfer of land or makes such transfers unenforceable between the parties. Patrick M. McFadden, *Oral Transfers of Land in Illinois*, 1988 U. ILL. L. REV. 667.

5. RESTATEMENT OF PROPERTY (SERVITUDES) § 2.7 reporter's note (Tentative Draft No. 1, 1989); RESTATEMENT OF PROPERTY (MORTGAGES) §§ 2.4, 3.1 reporters' notes (Tentative Draft No. 1, 1991); RESTATEMENT OF PROPERTY (MORTGAGES) § 5.5 (Preliminary Draft No. 5, 1995).

The Uniform Commercial Code suffered the same early rejection that now threatens the proposed uniform property laws. A large part of the solution for the rejection of the UCC was the widespread teaching of the UCC in law schools. The same solution is now being used to counter the rejection of ULTA and USOLTA. Those Acts have already been the topics of panel discussions by the drafters and other experts at meetings of property law teachers held during the annual meetings of the Association of American Law Schools. Many property teachers, including the author, regularly assign sections of ULTA and USOLTA for comparison and analysis in the classroom. The better property casebooks and hornbooks also utilize these Acts. As a result of this exposure, future generations of lawyers will be familiar with ULTA and USOLTA and will readily perceive their simplicity.⁶

The uses of ULTA and USLTA in coursebooks and classrooms vary from brief presentations of the history of the development of the Acts⁷ to informational references to, or quotations of, various provisions.⁸ Sometimes, the use is aimed at supporting a "better view" espoused by an author. Sometimes, the purpose is to provoke thought on how the provision, if adopted, would affect judicial decisions previously discussed.⁹ Sometimes,

6. Mattis, *supra* note 4, at 512.

7. See JON W. BRUCE & JAMES W. ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW 456-57 (3d ed. 1994) (noting that the Acts have had an indirect impact on the development of the law although neither has been adopted); JOHN E. CRIBBET ET AL., CASES AND MATERIALS ON PROPERTY 978-79, 1356 (6th ed. 1990) (suggesting that the Acts be used as supplemental material); CHARLES DONAHUE, JR., ET AL., PROPERTY 572 (3d ed. 1993); PAUL GOLDSTEIN, REAL PROPERTY 155 (1984) (discussing the costs of complexity and noting that "states have not rushed to adopt" USLTA, among the objects of which are to reduce the costs of title examination and the risks of title defects).

8. CURTIS J. BERGER & QUINTIN JOHNSTONE, LAND TRANSFER AND FINANCE 580 (4th ed. 1993) (quoting U.L.T.A. § 2-302); EDWARD H. RABIN & ROBERTA R. KWALL, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 799-801 (3d ed. 1992) (quoting U.L.T.A. § 2-201); *id.* at 911 (summarizing marketable record title act provisions of U.S.L.T.A. part 3, art. 3).

9. See, e.g., BERGER & JOHNSTONE, *supra* note 8, at 437 (asking whether the ULTA approach treating installment land contracts as mortgages is the best solution); RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 868 (1988) (discussing foreclosure procedures under ULTA); *id.* at 915-17 (discussing provisions on warranties of quality); CRIBBET, *supra* note 7, at 1015-16, 1020, 1031-32, 1075-76, 1207 n.5, 1279-80 (referring to U.L.T.A. § 2-309 as strongest position so far suggested for implied warranty of quality); *id.* at 1281, 1356; DONAHUE, *supra* note 7, at 574; SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 1081, 1099, 1171, 1180 (2d ed. 1993).

the Acts are used as richer and creative tools to spur students' thinking. Examples of the latter treatment are explored in this article.

II. STATUTE OF FRAUDS

At some point during the first-year property law course, the statute of frauds comes up. In teaching it, and the jurisprudence that goes with first-year courses generally, I try to lead students to consider whether certain judge-made doctrines are usurpations of legislative prerogatives.

A typical statute of frauds may provide that "[n]o action shall be brought . . . upon any contract for the sale of lands . . . unless the agreement . . . or some note or memorandum thereof shall be in writing . . .,"¹⁰ or "[e]very contract . . . for the sale of any lands . . . shall be void unless the contract, or some note or memorandum thereof . . . is in writing . . ."¹¹ Judges apply doctrines of their own creation, such as part performance or estoppel, to "take" certain situations "out of" the statute of frauds. Do not courts contradict the legislature when they create and utilize doctrines to enforce contracts for the sale of land absent a writing? In most states, these doctrines are not mentioned in the statute, which pretty clearly speaks in terms of "no action" and "every contract." Here, section 2-201 of the ULTA makes the point for me. It provides for what, if adopted, would be a legislative pronouncement of the doctrines.

(a) [E]xcept as provided in subsection (b), a contract to convey real estate is not enforceable by judicial proceeding unless there is a writing

....

(b) A contract not evidenced by a writing . . . is enforceable if: .

...

(2) the buyer has taken possession of the real estate and has paid all or a part of the contract price;

....

(4) either party, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to the extent that an unreasonable result can be avoided only by enforcing the contract¹²

Students, seeing a legislative enactment of the doctrines that takes the situation "out of" the general rule of the statute, can be persuaded that the

10. FLA. STAT. § 725.01 (1995).

11. MINN. STAT. § 513.05 (1988).

12. U.L.T.A. § 2-201.

exceptions are properly within the legislative, rather than judicial, domain. Professor Goldstein uses section 2-201 of ULTA to make a similar point when he asks, just before quoting the section, whether there are “better devices than the present statutes of frauds ‘to avoid perjury on the one hand and fraud on the other’?”¹³

In their coursebook, *Real Estate Transfer, Finance and Development*, Professors Nelson and Whitman use ULTA’s statute of frauds provision for a different purpose.¹⁴ They make the point that part performance usually requires at least two of three acts: payment of part (or all) of the purchase price; going into possession of the realty; and making substantial improvements. The commissioner’s comment is then quoted: “Mere taking possession of the real estate is not sufficient to satisfy the statute, but possession with part payment or possession with the change of position described in subsection (b)(4) is sufficient.”¹⁵ Nelson and Whitman pose the query whether the commissioner’s comment is consistent with the text of section 2-201(b)(4). This exercise presents an excellent opportunity for students to consider the weight of the drafter’s commentary in interpreting uniform statutes. All the while, students may think they are merely studying real property law. Giving students a hefty dose of jurisprudence or statutory interpretation in the context of substantive courses can go a long way in training future lawyers to be professionally competent.

III. OTHER FORMALITIES OF A CONVEYANCE

Section 2-201 of USLTA dispenses with the requirements of an acknowledgment, seal, and witnesses. Having presented a problem in which these formalities were omitted¹⁶ and relevant cases, Professors Rabin and Kwall quote section 2-201 of USLTA and refer to the official comments following it. They then ask whether dispensing with these formalities takes care of the issues in the problem posed. They discuss Brussack’s arguments supporting the USLTA position and his suggestion that USLTA would prevent litigation from arising when these ceremonies are improperly

13. PAUL GOLDSTEIN, *REAL ESTATE TRANSACTIONS* 70 (Rev. 2d ed. 1988); GOLDSTEIN, *supra* note 7, at 194-95.

14. GRANT S. NELSON & DALE A. WHITMAN, *CASES AND MATERIALS ON REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* 38 (4th ed. 1992). These authors cite to ULTA on 18 pages of the coursebook, and to USLTA on 2 pages, many pages of which cite the uniform acts numerous times. These citations occur in the first 276 pages of the coursebook in the part dealing with real estate transfer.

15. *Id.* (quoting U.L.T.A. § 2-201 cmt. 3)

16. RABIN & KWALL, *supra* note 8, at 773-74.

performed.¹⁷ The student is then asked to consider whether, if all formalities are abolished, other than the requirement of a written instrument signed by the grantor, issues similar to those in the principal problem would be more likely to arise.¹⁸

IV. RISK OF LOSS

Careful reading of statutes means learning to discern what a statute does not provide, as well as what it does. Playing off the Uniform Vendor and Purchaser Risk Act ("UVPRA"),¹⁹ in comparison with ULTA's provision dealing with destruction of premises,²⁰ can work well to teach that lesson. The former, adopted in about a dozen states, specifies the purchaser's remedy when all or a material part of improvements is destroyed after the execution of a contract of sale but before title or possession has been transferred.²¹ It also specifies the purchaser's lack of remedy when all or any part of improvements is destroyed after title or possession has been transferred.²² I ask students for UVPRA's solution when, before title or possession is transferred, a casualty diminishes the value of the improvements only to a nonmaterial extent. Frequently, I get a non-existent UVPRA solution. Contrasting section 2-406(b)(2) of the ULTA, which provides for this eventuality, with the UVPRA, which does not, should clinch the lesson.

Professor Goldstein contrasts the UVPRA's and ULTA's treatments of risk of loss for a different purpose. The former provides that, when the loss occurring before title or possession is transferred is material, the vendor cannot enforce the contract and the purchaser is entitled to recover her down payment.²³ The latter gives the purchaser, under the same circumstances, the option of cancelling the contract and recovering any down payment or enforcing the contract and accepting the property with an abatement in purchase price.²⁴ Goldstein calls for students to think critically about ULTA by asking "[c]an you think of situations in which it would be plainly

17. *Id.* at 784 (discussing Brussack, *supra* note 4, at 561). Similarly, the author of this article took the position that the formality of acknowledgment creates more problems than it cures. See Mattis, *supra* note 4, at 528.

18. RABIN & KWALL, *supra* note 8, at 784.

19. U.V.P.R.A. (1935).

20. U.L.T.A. § 2-406(b).

21. U.V.P.R.A. § 1(a).

22. *Id.* § 1(b).

23. *Id.* § 1(a).

24. U.L.T.A. § 2-406(b)(1).

unfair to require the seller to give up her property in return for a sharply reduced price?"²⁵

Professors Rabin and Kwall also compare ULTA with the UVPRA, noting that ULTA is more comprehensive. The authors quote section 2-406 of ULTA and ask several questions about it, the most provocative of which is whether the lack of specificity of UVPRA might make it a more attractive alternative than the ULTA provision.²⁶

Professor Chused quotes section 2-406 of ULTA to illustrate the trend toward rejecting the traditional rule placing the risk of loss on the buyer after the execution of a contract to purchase land.²⁷ He then focuses on the buyer's option of price modification or obtaining the benefit of seller's insurance coverage under ULTA. Chused suggests that ULTA's allocation of insurance proceeds to the buyer, when the value of the premises has not been affected by the casualty, may be inappropriate. This suggestion, together with background facts Chused has uncovered²⁸ about his chosen lead case,²⁹ makes the students' critical examination of the issue irresistible.

V. REMEDIES

A. *Specific Performance*

The old notion of the specific performance remedy was that mutuality required the remedy to be available to sellers because it was available to buyers. To illustrate a setting in which the old rule has become difficult to sustain, Professor Chused uses a case in which a buyer breached a contract to buy a unit in a high-rise condominium project. Indeed, the court denied

25. GOLDSTEIN, *supra* note 13, at 64; GOLDSTEIN, *supra* note 7, at 236. The issue is also discussed in the hornbook by ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 743-44 (2d ed. 1993).

26. RABIN & KWALL, *supra* note 8, at 1040-41.

27. CHUSED, *supra* note 9, at 847-48.

28. Chused frequently enriches and brings reality to his material by digging up background information concerning the lives and histories of the characters in the cases. For example, through a telephone conversation with the buyers of a condominium unit, Chused found out why they really breached their contract. *Id.* at 822 (discussing *Centex Homes Corp. v. Boag*, 320 A.2d 194 (N.J. Super. Ct. Ch. Div. 1974)). Chused also discovered why the seller of the condominium unit sought specific performance. *Id.* Through the transcript of the trial testimony of the sellers' agent in *Skelly Oil Co. v. Ashmore*, 365 S.W.2d 582 (Mo. 1963), Chused discovered the value to the buyer of a building that was destroyed by fire between execution of the contract and closing. CHUSED, *supra* note 9, at 850.

29. CHUSED, *supra* note 9, at 834 (discussing *Skelly Oil Co.*, 365 S.W.2d at 582).

the remedy to the seller.³⁰ In his notes following the case, Chused quotes sections 2-506 and 2-511 of ULTA, which treat the seller's action for the price differently from the buyer's right to obtain title. The student, when asked how the case would be decided under ULTA, is led to consider the ramifications of abandoning the mutuality of remedy doctrine.³¹

Professor Goldstein notes that "section 2-506(b) of the ULTA would give seller specific performance only if she is unable after reasonable effort to resell . . . at a reasonable price or the circumstances reasonably indicate the effort would be unavailing."³² Section 2-504 provides that if seller resells the land reasonably and in good faith, her damages are measured from the time of resale rather than from the time of breach.³³ Professor Goldstein wants the student to consider whether the two sections, taken together, will produce results different from those produced by seeking specific performance and damages under existing law.³⁴

B. *Seller's Obligation to Provide Marketable Title and Buyer's Remedies for Breach of that Obligation*

In their assignment about failure of marketable title, Professors Rabin and Kwall present a problem and cases with which to solve the problem. At the conclusion of the cases, the authors set forth the substance of the relevant ULTA sections on seller's obligation to provide marketable title at the time of conveyance.³⁵ The student is then given an opportunity to contrast ULTA's provisions with leading case law and apply both to solve the problem.

When a seller is unable to convey because of a title defect of which the seller had no knowledge at the time of entering into the contract, should the buyer only be entitled to restitution of any amounts paid on the contract price and incidental damages; or should the buyer be entitled to loss of bargain damages, regardless of seller's good faith? Rabin and Kwall use section 2-510(b) of the ULTA to illustrate the former position,³⁶ derived from the eighteenth century English case of *Flureau v. Thornhill*.³⁷ In

30. *Centex Homes Corp.*, 320 A.2d at 194.

31. CHUSED, *supra* note 9, at 828-29.

32. GOLDSTEIN, *supra* note 7, at 226.

33. U.L.T.A. § 2-504.

34. GOLDSTEIN, *supra* note 7, at 226.

35. RABIN & KWALL, *supra* note 8, at 910-11 (citing U.L.T.A. §§ 2-304, -305, -510).

36. *Id.* at 883, 911.

37. 96 Eng. Rep. 635 (C.P. 1776); *see also* GOLDSTEIN, *supra* note 7, at 226 (discussing ULTA position limiting buyer to restitution where seller is unable to convey because of title

contrast, the *California Civil Code* provides for loss of bargain damages in the case of a breaching seller (as well as of a breaching buyer), regardless of seller's knowledge of a title defect when seller executed the contract.³⁸ The authors ask the student to consider which rule is preferable.³⁹

Discussions about remedies can lead students to think about the practical ramifications to plaintiffs of civil wrongs, the proper role of defendants' culpability, and where theoretical consistency fits into the picture.

VI. RECORDING

Property law teachers sometimes use recording acts to emphasize the nature of acquisition of title by adverse possession. Recording acts usually provide that "instruments" or "conveyances" must be recorded in order for the taker of an interest in real property to maintain first-in-time priority against subsequent takers. If A's interest is acquired by possession adverse to O, it is not derived from an instrument or conveyance; rather it is an original title. Hence, it is not affected by the recording act. If O later conveys to B, even though A is no longer in possession, B is not protected. Rejecting that result, USLTA provides that "a purchaser for value who has recorded his conveyance [B] also acquires the real estate free of *any subsisting adverse claim*, [e.g., that of the adverse possessor A] . . . unless the adverse claim is . . . inconsistent with the record title to the extent the use or occupancy would be revealed by reasonable inspection or inquiry."⁴⁰ This would mean that the adverse possessor not wishing to remain in possession would have to bring a quiet title action to place her title on record to avoid the possibility of a recording subsequent purchaser's prevailing over her. Professors Rabin and Kwall use this context to stimulate the discussion of whether the USLTA rule should be generally adopted. In the process, students revisit the basic difference between derivative title, acquired by an instrument or conveyance, and original title.

Sailing on a different tack in the sea of recording, Professor Browder and coauthors explore the mechanics of recording.⁴¹ They quote from the prefatory note of USLTA, indicating that USLTA gives "[c]onsiderable

defect unknown to seller at time of entering into contract).

38. See CAL. CIV. CODE §§ 3306, 3307 (Deering 1996).

39. RABIN & K WALL, *supra* note 8, at 883.

40. U.S.L.T.A. § 3-202(a)(2) (emphasis added).

41. OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 846-47 (5th ed. 1989).

attention . . . to the mechanics of the recording system and to the division of functions among the various participants in the process.”⁴²

The recording officer is given discretion in the development of systems for modernization and automation of recording operations and is given the responsibility for moving toward a system of at least limited geographic indexing. At the same time, in anticipation of the eventual computerization of the recording system, the recording office is relieved of all responsibility for making conclusions about the legal effects of documents submitted for recording. The office of state recorder is created to allow for coordination and sharing of experience in the modernization of recording practices.⁴³

After stating that, unfortunately, state legislatures have shown little interest in USLTA or its concepts,⁴⁴ the authors imply a possible reason—at least for the lack of interest in modernizing the mechanics of the recording system. In many areas of the nation, there is little search activity in the average recorder’s office. Title plants, owned by abstract or title insurance companies, have taken over most searches. They arrange their records on a tract-index basis, obviating chain-of-title problems that so plague first-year law students trying to understand grantor-grantee searches. The importance of expensive reform of public records is diminished by computerization and tract indexing in the private sector.

VII. MARKETABLE RECORD TITLE ACTS

One topic usually introduced in first-year property law courses is the various marketable record title acts adopted in some eighteen states. Informing students about the attempts to limit title searches to a reasonable period of time can be a daunting task. Some coursebooks attempt to do this by presenting a case or two discussing one or more particular provisions of a particular state statute. At least three coursebooks make efficient use of USLTA as a teaching device by setting forth Article 3, Part 3, “Marketable Record Title,” in its entirety, or virtually in its entirety.⁴⁵ In the clearest

42. *Id.* (quoting U.S.L.T.A. prefatory note).

43. U.S.L.T.A. prefatory note.

44. The authors note that § 119.07 of the *Florida Statutes* is an exception. It provides for protection of computer software developed by public agencies to facilitate access to records. BROWDER, *supra* note 41, at 847.

45. *Id.* at 895-99; BRUCE & ELY, *supra* note 7, at 581-85; DONAHUE, *supra* note 7, at 622-24. The Donahue coursebook also sets forth USLTA curative provisions. *Id.* at 620-21.

form of statutory exposition, this part of USLTA gives students a model marketable title act, which is derived from legislation originally adopted in Michigan,⁴⁶ and subsequently in several other states. The Donahue coursebook follows quotation of the relevant provisions of USLTA with four problems exploring whether the Act would render a title marketable and whether a searcher could safely rely on a search back to "the root of title."⁴⁷ The coursebook by Bruce and Ely asks questions to test the students' understanding of the Act and to explore possible constitutional problems.⁴⁸

A fourth coursebook sets forth the prefatory note to USLTA's marketable record title provisions, describing what the Act attempts to accomplish.⁴⁹ In notes following the quotation, the authors then discuss whether a thirty or forty-year time period is preferable, who benefits and what interests are protected under the Act, and exclusions from the Act.⁵⁰

VIII. EXCEPTIONS AND RESERVATIONS

Distinctions between exceptions and reservations in deeds have long been arcane. Cases dealing with whether an exception or reservation can be made in favor of a third-party are grist for the mill of study about the creation of servitudes. In Rabin and Kwall's first-year property law coursebook, the authors present a problem containing such an issue,⁵¹ followed by relevant cases.⁵² The clear solution of section 2-204(b) of USLTA is quoted: "An exception or reservation of an interest in real estate may be made in favor of a person not a party to the conveyance or who has no other interest in the real estate."⁵³ The authors follow with the question, provocative to a first-year law student: "If a court faced with the

46. See U.S.L.T.A. § 3 pt. 3, cmt.

47. DONAHUE, *supra* note 7, at 624-25.

48. BRUCE & ELY, *supra* note 7, at 585. This coursebook also contains excerpts from *Report, Residential Real Estate Transactions: The Lawyer's Proper Role — Services — Compensation*, 14 REAL PROP. PROB. & TR. J. 581, 595-98 (1979), referring to USLTA's marketable title act as deserving "serious consideration by the organized bar and state legislatures." BRUCE & ELY, *supra* note 7, at 577, 579.

49. BERGER & JOHNSTONE, *supra* note 8, at 947-48.

50. *Id.* at 950-53.

51. RABIN & KWALL, *supra* note 8, at 362.

52. *Willard v. First Church of Christ, Scientist, Pacifica*, 498 P.2d 987 (Cal. 1972) (holding that a "reservation" can be made in favor of third-party, but an "exception" cannot vest part of grantor's interest in third-party); *Estate of Thomson v. Wade*, 509 N.E.2d 309 (N.Y. 1987) (finding no reservation in favor of third-party).

53. RABIN & KWALL, *supra* note 8, at 378 (quoting U.S.L.T.A. § 2-204(b)).

Principal Problem wanted to follow the rule of section 2-204(b), could it draw any support from this section even if the legislature has not adopted this section?"⁵⁴ Indeed, courts have drawn support from the ULTA and USLTA sections, even though the Acts remain unadopted by legislatures.⁵⁵

IX. RECASTING LAND FINANCING DEVICES

Professor Goldstein uses ULTA's goal in its secured transactions sections to kindle students' thinking about whether the immense variety of land finance devices could be unified and made more coherent. Goldstein leads students through the history of mortgage law from the dead pledge through the equity of redemption and foreclosure developments and discusses the deed of trust, the installment land contract, the lease with option to buy, and the equitable mortgage. Doctrinal distinctions, such as title, intermediate, and lien theory of mortgages, with little practical consequence, further complicate the picture. At the conclusion of this section in his coursebook, Goldstein's discussion of ULTA's Article 3, "Secured Transactions," is refreshing. Article 3 is aimed at consolidating the various forms of land finance into a single, integrated system. A simple and unified structure would "go forward with greater certainty and less transaction costs," than the present variety of land finance forms, often used to obscure their intent to create security interests in real estate.⁵⁶ The fact that the ULTA has not been adopted by any state should not obscure the drafters' vision that the proposed law could provide a better way.⁵⁷

54. *Id.* A similar question is posed with regard to the ULTA provision that all covenants of title, whether present or future, run in favor of remote grantees. U.L.T.A. § 2-313(a). Can this provision be used for the benefit of a remote grantee even though no legislature has adopted it?

55. Korngold, *supra* note 3, at 1071-73.

56. GOLDSTEIN, *supra* note 7, at 419 (quoting introductory comment to Article 3 of ULTA).

57. Goldstein uses other sections of ULTA to describe, clarify, summarize, or compare various approaches. *See, e.g.*, GOLDSTEIN, *supra* note 13, at 96 (citing U.L.T.A. § 2-301—rejection of time is of the essence enforcement); *id.* at 128-29 (citing U.L.T.A. §§ 2-504, -506—innovations in vendors' remedies); *id.* at 178-79 (citing U.L.T.A. § 1-309—abolition of doctrine of merger; U.L.T.A. § 2-402—possibilities that preclosing undertakings may govern post-closing rights; U.L.T.A. § 2-306—implication of title warranties in deed; U.L.T.A. §§ 2-308, -309—warranties of quality); *id.* at 397 (citing U.L.T.A. § 3-208—prevention of lender double-dipping by exercise of due-on-sale acceleration and collection of prepayment penalty from protected party); *id.* at 405 (citing U.L.T.A. § 1-313—exception to holder in due course status favoring protected parties executing second or more junior liens); *see also* GOLDSTEIN, *supra* note 7, at 280-81 (discussing abolition of merger doctrine and implication of title

Professor Chused compares the holding of a leading Indiana case⁵⁸ with ULTA's definition of "security interest," requiring the use of foreclosure in installment land contracts and all settings in which land is used as collateral for credit.⁵⁹

X. CONCLUSION

This author is not so optimistic as she was in 1981⁶⁰ about teaching ULTA and USLTA in law schools as a method of countering their rejection by state legislatures. The use of the uniform acts in law classrooms and coursebooks has achieved admirable goals tangential to the purpose of the Uniform Commissioners in undertaking their task.

The use of ULTA and USLTA in classrooms and coursebooks has provided a context for thinking about the proper roles of the legislative and judicial branches; for preventing or curing caseblindness (perhaps better termed "statute blindness") as students learn to read statutes; for interpreting statutes, including considering the weight of drafters' commentary; for thinking about the efficacy of proposed solutions to solve perceived problems without creating worse ones; and of practical or economic ramifications of civil wrongs and remedies. If the uniform acts, though unadopted, facilitate these and other opportunities for learning, good for them and the coursebook authors and classroom teachers who use them.

warranties in deeds).

58. *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973), *cert. denied*, 415 U.S. 921 (1974) (holding a conditional land sales contract to be in the nature of a secured transaction, the provisions of which are subject to all proper and just remedies at law and in equity).

59. CHUSED, *supra* note 9, at 854, 863-64. Chused analyzes the ULTA's definition of "security interest," recognizing that legal arrangements established under one legal construct, like a lease, may actually serve the purposes of a quite different legal construct, like a mortgage. *Id.* at 870. "But [the ULTA] is very indefinite about the circumstances in which the language used in the documents will be 'pierced.'" *Id.*

60. *See Mattis*, *supra* note 4, at 512; *see also supra* text accompanying note 6.